

## The Ombudsmen and information

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*In this paper Deborah Shelton investigates the ombudsman's existing role in relation to access to official information and enquires whether the role assigned to the office in the Official Information Bill 1981 is an appropriate one.*

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### I. INTRODUCTION

The Official Information Bill, introduced<sup>1</sup> into the New Zealand House of Representatives in July 1981, provides<sup>2</sup> that the ombudsman should act as the review mechanism for complaints from individuals that they have been improperly refused access to official information. This provision was the result of the proposal, by the Danks Committee,<sup>3</sup> that the ombudsman should deal with individual complaints about the disclosure and non-disclosure of information. The Committee had commented, in its General Report, that<sup>4</sup>

the Ombudsmen already can and do handle cases in the information field, in accordance with their well established procedures and with the mana that the office has acquired over two decades.

This article investigates the existing role played by the Office of the Ombudsmen, in providing individuals with access to information about or held by official agencies, by analysing the access to information element in recent complaints investigated by the New Zealand ombudsmen.

One of the earliest commentaries on the institution of the ombudsman saw the ombudsman's own right of access to departmental files as the most important characteristic of the office:<sup>5</sup>

I believe that the main justification for the establishment of the office of the Ombudsman is that the existing rules relating to Crown privilege in many cases preclude any effective review of administrative decisions by the ordinary courts or by administrative appeal tribunals.

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1 July 1981.

2 Part V of the Official Information Bill 1981.

3 Committee on Official Information. Chaired by Sir Alan Danks and consisting also of Professor K. J. Keith, Victoria University, the Deputy Secretary for Justice, an Assistant Secretary of Foreign Affairs, Chief Parliamentary Counsel, the Secretary for Defence, the Secretary of the Cabinet, and the (retired) Chairman of the State Services Commission.

4 Committee on Official Information *Towards Open Government* General Report (Government Printer, Wellington, 1981) para. 99, p. 30.

5 C. C. Aikman "The New Zealand Ombudsman" (1964) 42 Can B. Rev. 399, 407.

What has not been so widely recognised is the ombudsman's ability to make information about government and the processes of government decision-making available to the individual, in a number of different ways. Information, and access to the information held by departments and organisations, is basic to the role and duties of the ombudsman. Even the most routine investigation into a complaint about "a matter of administration" involves an evaluation of the basis upon which the decision was made,<sup>6</sup> the information before the decider<sup>7</sup> and the grounds or reasons for the decision.<sup>8</sup>

## II. JURISDICTION, FUNCTIONS AND POWERS OF THE OMBUDSMAN

The function of the ombudsman is to investigate "any decision or recommendation made, or any act done or omitted . . . relating to a matter of administration and affecting any person or body of persons in his or its personal capacity."<sup>9</sup> All the departments, organisations and bodies listed in the First Schedule to the Ombudsmen Act 1975 are subject to the ombudsman's jurisdiction.<sup>10</sup>

The ombudsmen may investigate a recommendation made by a department to a minister of the Crown,<sup>11</sup> although the decision or actions of a minister may not be investigated. An investigation may be commenced either on a complaint made to an ombudsman by any person or of his own motion.<sup>12</sup>

The ombudsman has jurisdiction to investigate where it might appear that the decision, recommendation, act or omission, which is to be the subject of the investigation —

- (a) Appears to have been contrary to law; or
- (b) Was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or a provision or any Act, regulation, or bylaw or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory; or
- (c) Was based wholly or partly on a mistake of law or fact;  
or
- (d) Was wrong.

The ombudsman also has jurisdiction where —

in the making of the decision or recommendation, or in the doing or omission of the act, a discretionary power has been exercised for an improper purpose or on irrelevant grounds or on the taking into account of irrelevant considerations, or that, in the case of a decision made in the exercise or any discretionary power, reasons should have been given for the decision.

6 Ombudsmen Act 1975, s.22(1)(a)(b) & (e).

7 Ibid. s.22(1)(b)(c) & s.22(2).

8 Ibid. s.22(1)(b)(d) & s.22(2).

9 Ibid. s.13(1).

10 Idem. The First Schedule to the Official Information Bill 1981 contains a list of further organisations, additional to those listed in the Ombudsmen Act 1975, to which the Act would apply.

11 Ibid. s.13(2). Under the Official Information Bill 1981, cl.27 the ombudsman would be able to review decisions of Ministers of the Crown.

12 Ibid. s.13(3).

The normal procedure is to notify a department of a complaint, and to seek a report from the department on the subject of the complaint and the relevant departmental file or files. Section 19 authorises the ombudsman to require any person to provide him with information or documents which relate to the matter being investigated.

Under section 20(2) the rule of law<sup>13</sup> which authorises or requires the withholding of any document or paper or the refusal to answer any question on the ground that the disclosure of the document or paper or the answering of a question would be injurious to the public interest shall not apply in respect of any investigation by or proceedings before an ombudsman except where the Attorney-General certifies that the giving of any information<sup>14</sup>

- (a) Might prejudice the security, defence, or international relations of New Zealand (including New Zealand's relations with the Government of any other country or with any international organisation), or the investigation or detection of offences; or
- (b) Might involve the disclosure of the deliberations of Cabinet; or
- (c) Might involve the disclosure of proceedings of Cabinet, or of any committee of Cabinet, relating to matters of a secret or confidential nature, and would be injurious to the public interest . . . .

The ombudsman has power only to make recommendations or to report. He has no power to direct or decide.<sup>15</sup> After making an investigation the ombudsman may report to the department or organisation that, in his opinion —

- (a) the matter should be further considered,
- (b) an omission should be rectified,
- (c) the decision should be cancelled or varied,
- (d) any practice on which the decision, recommendation, act or omission was based should be varied,
- (e) any law . . . should be reconsidered,
- (f) reasons should be given, or
- (g) any other steps should be taken.

Under section 18(4) the ombudsman may consult a Minister at any stage of his investigation, and where the investigation is concerned with a recommendation made to a Minister he is required to consult the Minister at the completion of an investigation and before he forms a final opinion. The ombudsman must send a copy of his report recommendations to the Minister concerned.<sup>16</sup> The report may be referred, on to the Prime Minister and to Parliament as the ombudsman thinks fit.<sup>17</sup>

13 I.e. public interest immunity, previously known as Crown privilege, see *Environmental Defence Soc. Inc. v. South Pacific Aluminium Ltd (No. 2)* [1981] 1 N.Z.L.R. 153.

14 Ombudsmen Act 1975, s.20(1). This power has never been exercised.

15 Official Information Bill, cl. 31(2) makes the ombudsman's recommendation automatically operative after 22 days, unless the minister indicates otherwise.

16 Ombudsmen Act 1975, ss.18(4) and 22(3).

17 *Ibid.* s.22(4).

It is suggested that the Office of the Ombudsman has had a triple role to play in making information, held by the executive, available to the general public. First it makes information generally public about the operation of the government system. This is done in three different ways —

- (1) in Special Reports, such as the one on the N.Z. Security Intelligence Service,<sup>18</sup>
- (2) in the Ombudsmen's Annual Reports to Parliament which contain information about the ways in which particular powers are exercised and,
- (3) in reports on particular complaints which often make suggestions about the provision of information in the future.

Second, it can make specific information about a particular decision available to a complainant who has been affected by that decision. These two roles will be examined with examples illustrating the range of questions involved. Finally, the ombudsman has already dealt with a number of complaints against specific refusals of requests for information. The way in which these requests were handled will be evaluated.

### III. GENERAL INFORMATION ABOUT GOVERNMENT

#### *A. Special Reports*

The report by the Chief Ombudsman on the Security Intelligence Service discussed, explained and examined<sup>19</sup>

- (a) the range of activities which are undertaken by the S.I.S. (counter-espionage, counter-subversion, agents and information sources, vetting procedures, screening of persons entering New Zealand, applications for citizenship and naturalisation) ;
- (b) arrangements for control of the operations of the New Zealand S.I.S. ;
- (c) the administrative functioning of the service (staffing, recruitment and terms of service) ;
- (d) the use made by the government and its agencies of information provided by the service ;
- (e) the relationship of the service with other organisations, including other security organisations.

The report was prompted by a sense of uneasiness that had developed about the service, occasioned by the general public ignorance about its operations. The report was able to dispel some of this uneasiness by presenting a reasonably clear picture of the service's functions, with no apparently detrimental results for the service's operations.

In a similar way general information about the administration of the Department of Trade and Industry was made public in the Chief Ombudsman's Report on

18 Report on the Security Intelligence Service by the Chief Ombudsman, presented to Parliament pursuant to s.13(5) of the Ombudsmen Act 1975.

19 Ibid.

that department's granting of import licences to R. J. La Varis Ltd.<sup>20</sup> This investigation was referred<sup>21</sup> to the Chief Ombudsman as a result of a public controversy which implied that special treatment had been accorded by the department to the firm on improper grounds.

During the course of the specific allegations made against the department, a number of general questions were also raised regarding import licensing as a whole,<sup>22</sup> *inter alia*

- (a) the secrecy surrounding the issue of special trade licences. It was alleged that knowledge of the availability of such licences was confined to a select group of favoured importers . . . . It was also suggested that their use and existence had brought New Zealand's commitment to G.A.T.T. into question.
- (b) the general problem of non-disclosure of information about individual companies' import licence holdings.

The report on the specific allegations needed to establish the policy background of import licensing and special trade licences, the recent import licensing trends, the manner of its administration and the department's objectives in administering the system. The report made a number of suggestions for the provision of more detailed information to the public about departmental policy and procedures.<sup>23</sup>

### B. Annual Reports

Many of the cases reported in the ombudsman's annual reports contain information about the criteria or factors that are relevant to the exercise of particular executive powers or discretions. For instance, a case in the *1976 Annual Report*<sup>24</sup> revealed the factors seen by the Commissioner of Inland Revenue to be relevant to the assessability for tax of profits on the sale of land. The complainant had sought a ruling from the department on his tax liability in the event of his proceeding with a subdivision proposal. When the department indicated that he would be liable to tax on any profit he made, the complainant asked the Ombudsman to "look into" the department's decision.<sup>25</sup> The legislature had drawn a distinction between cases in which the subdivision work was incidental to the realisation of the taxpayer's capital investment and cases where there had been a "scheme" of development. The Commissioner informed the Ombudsman<sup>26</sup> that, while the circumstances of each individual case were considered, the department had regard to

20 Report by the Chief Ombudsman on the Department of Trade and Industry's granting of Import Licences to R. J. La Varis Limited. Presented to the Prime Minister pursuant to s.13(5) of the Ombudsmen Act 1975.

21 Under the Ombudsmen Act 1975, s.13(5).

22 Part I, para. 5 of the La Varis Report, see n. 20.

23 Part 7, paras. 3, 9, 10, 11 & 13 of the La Varis Report, see n. 20.

24 Case 9532, *1976 Annual Report of the Ombudsman* at p. 19, hereafter such reports are referred to as e.g. *1976 Annual Report* 19.

25 Since the department's ruling had been made in advance of any transaction and there was no statutory right of objection available to the complainant, the Ombudsman had jurisdiction to investigate. If the statutory right of objection had been available, s.13(7) would have removed the Ombudsman's jurisdiction.

26 Case 9532, see n. 24, at p.20.

- (a) the number of lots produced in relation to the total area,
- (b) the extent of physical work involved, and
- (c) whether the development involved substantial work on existing buildings.

The result of this articulation of criteria was that it became clear that the complainant did not fall within the terms of the departmental factors and was therefore not subject to tax on the proposed scheme.

Case W12193<sup>27</sup> concerned a decision of the Customs Department, and examined the Minister of Customs discretions regarding the importation of goods free of duty and sales tax. The complainant had taken up employment overseas on a three year contract. He purchased some stereo equipment with the expectation that he would be able to satisfy the requirements of the concession which permits personal and household effects to be imported free of duty.<sup>28</sup> He had had to return to New Zealand earlier than expected because of illness. Duty and sales tax had been levied on his stereo equipment.

From a previous investigation, the Ombudsman was aware that the Minister had approved<sup>29</sup> the entry of goods belonging to armed forces personnel and civilian officers who were forced to return to New Zealand earlier than expected for reasons beyond their control, so failing to qualify for the "household effects concession". The department made no reference, in letters sent to members of the public, to this alternative discretion. In fact it stated that there was no discretion. The Ombudsman recommended that the department examine the discriminatory effect of extending this extra concession to a limited group of people. The Ombudsman suggested a way in which the discretion could be worded so as not to operate in a discriminatory manner. The report made the existence of this discretion public.

### C. Reports of Particular Complaints

The ombudsman may recommend, after investigating a particular complaint, that in the future more information should be made public about the particular power in question. The intended result of such a recommendation is the reduction in the future of, either the number of applications for the "benefit"<sup>30</sup> in question since potential applicants are aware of the factors relevant to the decision, or of complaints.<sup>31</sup>

In Case W11210<sup>32</sup> a recommendation was made that the guidelines under which the National Provident Fund Board was exercising its discretion should be made available to contributors. The Board had adopted the practice of determining applications from individuals for permission to purchase service for superannuation purposes in accordance with a set of criteria which had the effect of establishing a

27 1978 Annual Report 27. See also Case W14678, 1980 Annual Report 47 discussed in Part V.

28 Customs Tariff, Part II, reference 27(1)(c).

29 Under Customs Tariff, Part II, reference 10.2.

30 Used here with its widest possible meaning.

31 See, for instance 1978 Annual Report 9. Discussed in Bowie's article in this issue.

32 1979 Annual Report 62.

narrower rule than that contained in the relevant Superannuation Scheme.<sup>33</sup> The Ombudsman agreed that it was quite proper for the Board to adopt general guidelines, provided they were made known to the contributors. The complainant in this case had no way of knowing that the arguments she had advanced as exceptional circumstances would not be expected to receive favourable consideration in terms of the current policy. The Ombudsman suggested that in future the Board should make known any guidelines it adopted for the exercise of its discretion. This recommendation the Board accepted.

Another case<sup>34</sup> in this category arose from a complaint made by a senior professional officer of a government department against a massive reduction in his salary following a re-organisation of the department's activities. One suggestion made by the Ombudsman in this case was based on his concern at the absence of adequate written records revealed by his investigation. He proposed that all future recommendations, made by the State Services Commission, which gave rise to a reduction in an officer's salary, should be recorded and conveyed to the officer in writing, together with the reasons<sup>35</sup> why the salary was being reduced.

On a much larger scale, in Case 9757<sup>36</sup> the Ombudsman proposed that in future the Education Department should initiate free and informal discussions with local residents who would be affected by proposals for the development of facilities at a teachers' college. He suggested that such discussions should take place before firm proposals were submitted to the Government, which would then have available to it information about the possible reactions of residents when it made a decision.<sup>37</sup>

#### IV. SPECIFIC INFORMATION ON A PARTICULAR DECISION OR ACTION

The ombudsman has access to the current governmental policy on an issue. Therefore he is able to determine whether any information held by the complainant would be relevant to the department's decision.<sup>38</sup> Alternatively, the ombudsman's access to the departmental files may disclose that the information upon which a decision was made was in some other way inadequate or incomplete.<sup>39</sup> A mining company<sup>40</sup> complained that the Minister of Mines<sup>41</sup> had required it to forfeit a deposit paid for prospecting licences on the ground that the company had failed to "substantially comply" with the terms of its licence. Section 38 of the Petroleum

33 Nursing Service Superannuation Scheme 1969, cl. 7.

34 Case W10707. *1977 Annual Report* 27.

35 Note that under cl. 21 of the Official Information Bill 1981 an individual has a right of access to the reasons for decisions affecting that person.

36 Case 9757 *1976 Annual Report* 17.

37 The department failed to act on this recommendation. Instead it informed the residents about a course of action decided upon and of their statutory rights. This case was one of a number which the Ombudsman considered while examining procedures for the acquisition of land by the Crown: see Case 9757, *supra* n.36, at p.20.

38 See for example Case W12193, discussed in Part III and the Overstayer's Review Tribunal criteria case *1978 Annual Report* 9, discussed by Bowie in this issue.

39 See, for example, the electricity line case, W11817, discussed in Part V.

40 Case 9709, *1977 Annual Report* 20.

41 The Ombudsman did not have jurisdiction over the Minister's decision, but he could examine the Department's recommendation under the Ombudsmen Act 1975, s.13(2). See *supra* n.11.

Act 1937 conferred a power on the Minister to excuse compliance where the Minister is satisfied that "the failure . . . to comply . . . had been due to causes beyond the control of the licensee or that for any other reason the failure of the licensee to comply . . . should be excused." The Ombudsman formed the opinion that the department had failed to draw to the Minister's attention two matters which were relevant to his section 38 discretion:

- (1) The department had acquiesced in the limited scope of the company's activities in the first 3 or 4 years of the licence.
- (2) The flow of international speculative finance had diminished in the last 2 years of the licence.

Finally the ombudsman is often able to inform complainants about the basis of and reasons for decisions made affecting them.<sup>42</sup>

One simple example of this was a complaint<sup>43</sup> from a public servant that the Electricity Division of the Ministry of Energy had declined his application for promotion. The complainant considered that the duties he performed were such that he could satisfy the requirements laid down in the award under which he was paid for recognition at the higher position. He therefore considered the decision was unreasonable. The department's report set out in detail the range of duties performed by a typical person holding the higher position. When the complainant was notified of this information, he replied that if it had been available before he would not have pushed his application so diligently.<sup>44</sup>

A quite different example is provided by a complaint<sup>45</sup> made by the president of the New Zealand section of an international organisation who had been interviewed in an informal manner about the organisation by a member of the police force. She was concerned that the interview might have been actuated by pressure from political or security intelligence sources. The Commissioner of Police assured the Ombudsman, who told the complainant, that the interview was in accordance with a standard police practice of ascertaining the aims and objectives of any organisation which might in the future require police assistance or police intervention.

## V. COMPLAINTS ABOUT REFUSALS OF ACCESS TO INFORMATION

In the *1981 Annual Report*<sup>46</sup> the Chief Ombudsman comments<sup>47</sup> that, if the legislature decides to accept the proposals recommended by the Danks Committee, that improper denial of access to information will be investigated by the ombudsman, "it will be entirely compatible with the accepted concept of the office".

42 See K. J. Keith "The Ombudsman and 'Wrong' Decisions" (1971). 4 N.Z.U.L.R. 361, 382. In this context it is worth noting that when the ombudsman notifies people of existing statutory rights of appeal, he is performing an information function, see Napier and Matheson in this issue.

43 Case 14918, filed at Office of the Ombudsmen.

44 See also Case 15361, filed at Office of the Ombudsmen and W10187, *1977 Annual Report* 23.

45 Case W11008, *1974 Annual Report* 25.

46 *1981 Annual Report*.

47 *Ibid.* 3.



He goes on to say<sup>48</sup>

Indeed, it has always been a function of my office to receive and investigate complaints of that kind. Under the proposals of the Danks Committee the basis of access by the citizen will be greatly enlarged, but the nature of the complaints will remain the same — they will relate to “matters of administration” in the sense contemplated by the Ombudsmen Act 1975.

The intention of this section is to examine a number of the “complaints of that kind” which the ombudsman has investigated and to evaluate the ombudsman’s handling of those cases against the provisions of the Official Information Bill 1981.

An existing case concerning the New Zealand Electricity Department helps to indicate the way in which these future duties are likely to be performed by the ombudsman. It<sup>49</sup> concerned a decision of the Minister of Electricity as to the siting of a transmission line across farming land which was intensively used for cropping, vineyards and sheep farming. The complainants claimed that there was an alternative route which was more direct, less costly and less disruptive to farming operations than that decided upon. The Ombudsman was unable to investigate the Minister’s actual decision but he could<sup>50</sup> and did investigate whether the department had put all the relevant material before the Minister, to assist him with the decision. Consequently the complaint was that the material put before the Minister was inadequate.

The Ombudsman’s examination of the departmental file<sup>51</sup> disclosed four sources of and types of information: reports from the Commission for the Environment and from the Nature Conservation Council on the environmental effects of the two routes, departmental calculations and costings and evaluations of technical difficulties, and advice from the Ministry of Agriculture and Fisheries on the impact of the possible routes on farming operations (this took the form of answers to questions posed by the Electricity Department about the routes, rather than a comprehensive report upon the routes). The Ombudsman concluded<sup>52</sup> that the recommendations from the department to the Minister were deficient in so far as they related to the impact of the two routes on farming operations and that the Minister had not been adequately informed about the possible interference with current and foreseeable farming operations.

The Ombudsman commented that he saw his role to be that of<sup>53</sup>

ensuring that the administrative procedures of the department were operating in such a way that in reaching his decision the Minister had before him comprehensive, relevant and accurate information.

This case is an example of the ombudsman evaluating the information base of a decision, as discussed in Part IV and might serve as a model for the role of the ombudsman as complaintsman in the access to official information field. His role would be to ensure that

48 *Idem.*

49 W11817, 1978 *Annual Report* 44.

50 Ombudsmen Act 1975, s.13(2).

51 W11817, see n. 49.

52 *Idem.*

53 *Idem.*

- (a) the person who decided to deny access to the information had had before him all the material relevant to the decision;
- (b) all the factors and interests affected by the decision were recognised by the decision maker;<sup>54</sup>
- (c) in balancing the various considerations the proper emphasis has been put on the different factors involved.

#### *A. Inspection of Personal Files*

Under clause 22 of the Official Information Bill a legal right of access is given to any individual to personal information held about that person.<sup>55</sup>

Some years ago the Ombudsman received a complaint from the solicitor for a war pensioner, who complained that the Social Security Department, which handled war pensions, had refused him permission to inspect his client's file.<sup>56</sup> The pensioner had at one time been in practice as a solicitor but had allowed his business to fall into disarray and he had been struck off the Roll. The lawyer/complainant sought from the War Pensions Board file certain information relating to the pensioner's medical condition during the concluding years of his legal practice. His intention was to approach the Disciplinary Committee of the New Zealand Law Society, explaining the reasons for his client's lapse and consequently removing any stigma from the record.

The Ombudsman found that the War Pensions Board regarded the files as containing material which was confidential to the Board itself. The general rule was that files would not be made available unless the matter concerned the pension and it was expected that perusal of the file would be advantageous to the pensioner.<sup>57</sup> The file, which was made available to the Ombudsman, contained no information about the pensioner's mental health in the years before his breakdown. It made it clear that the decision of the Board to grant a pension was made on the medical advice produced by the pensioner's own doctor, supplemented by a report from the Board specialist who had obtained his information from the pensioner's wife. This information was made available to the complainant with the consent of the Board.

Would the same result be reached under the Official Information Bill 1981? Clause 22 does not limit the disclosure of information to individuals solely to situations where they can justify that disclosure. It confers a right. Only one of the grounds in clause 25 (reasons for refusal of requests for personal information) would appear to apply in this case, that is clause 25(c):

54 This role would be the central role conferred by the Official Information Bill 1981. The ombudsman would be ensuring that the person making the decision to refuse access to the information had properly weighed the cl.7 "good reasons for with-holding information" against the cl.5 presumption of accessibility.

55 Official Information Bill 1981, cl. 22, see n.11.

56 See the article by Maskill in this issue regarding solicitors inspecting Hospital Board files for their clients.

57 Case 2830, 1967 *Annual Report* 79. Note that the Official Information Bill 1981 does not require individuals to establish why they want the s.22 information or leave any discretion to the department. Access is of right.

A Department . . . may refuse to disclose any personal information . . . if, and only if —

- (a) The disclosure of that information or of information identifying the person who supplied it, being evaluative or opinion material compiled solely for the purpose of determining the suitability, eligibility, or qualifications of the individual for employment or for appointment to office or for the awarding of contracts, awards, scholarships, honours, or other benefits, would breach an express or implied promise —
  - (i) Which was made to the person who supplied the information; and
  - (ii) Which was to the effect that the information or the identity of that person or both would be held in confidence.

Presumably the information held on the file was “evaluative or opinion material compiled . . . for the purpose of determining the . . . eligibility . . . of the individual . . . for the awarding of . . . benefits”, although it could be argued that this provision applied only in the employment/appointment context, so as to prevent the disclosure of references. However, it was clearly the practice of the Board to allow pensioners to inspect the files for certain purposes, consequently the Board cannot have held out any promise that information provided to it and held on its files would be held in confidence. This view is reinforced by the presumption of availability in clause 5:

The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it.

Another situation where people have sought access to files concerning them held by a department is where a social welfare beneficiary has sought the name of a person who had informed on them to the department. It is suggested that such information would not fall within the category of “personal information which is about him” in clause 22. But if it was it would be protected by clause 25(c). If it does not fall within the class of personal information which is available as of right then it would be within the wide category of information that is disclosable at the discretion of the department. It would be protected by clause 7(b) as information properly entrusted in confidence to any department.

The Ombudsman has dealt with two cases in this area. One<sup>58</sup> concerned a lady who was in receipt of a partial benefit. She sought from the department the identity of the person who had (as investigation showed, quite wrongly) informed the Department of Social Welfare that she was living in a *de facto* relationship. She suspected that the informant was her ex-husband and alleged that he had supplied the information as part of a campaign of harassment he was waging against her.<sup>59</sup> The complaint was that the department’s refusal to provide this information was unreasonable. The department claimed that the information could not be disclosed on the grounds of public interest. In preventing abuses of the social security system the department had to rely on people who were prepared to provide them with information. Failure to maintain confidentiality would be seen as a disincentive to

58 Case 13628, filed at the Office of the Ombudsmen.

59 The information was sought to institute legal proceedings either for breach of a non-molestation order and/or for defamation.

approach the department and, it was argued, this would be contrary to the public interest. No doubt this is the sort of argument that will be addressed to clause 7(b) to provide a good reason for refusing access to certain information; that the information was properly entrusted to the department in confidence. The Ombudsman's investigation was discontinued.<sup>60</sup>

In a similar case<sup>61</sup> relating to the Department of Social Welfare<sup>62</sup> the complainant sought the identity of a person who had informed the department that the complainant's children were not under proper supervision and care while staying with their grandmother. Again there was some evidence to suggest the allegation had been made maliciously. The Ombudsman accepted that this refusal to make the identity of the informer available was reasonable. An investigation was undertaken to inquire into the department's procedure for checking information before acting on it.<sup>63</sup>

In a final case<sup>64</sup> concerning files of the Department of Social Welfare a complainant had asked to be supplied with copies of the department's ledger cards relating to his payment of maintenance so that he could satisfy himself that they were an accurate record. His request arose from a strong indication, contained in correspondence which he had received from the department that there had been a failure to record a substantial payment which he had made by cheque. This request had been declined by the local office of the department. In reporting to the Ombudsman on the complaint the Director-General stated that there was no reason why the request could not be fulfilled and that he had asked the local office to arrange for the copies to be supplied. This procedure and result is fully in accordance with the terms and the spirit of clauses 5, 22 and 24.<sup>65</sup>

The Ombudsman's intervention in another case<sup>66</sup> was directed to a similar end. The complainant was a motelier whose motel had been removed from the Tourist and Publicity Accommodation Manual after a general survey, without being notified of the department's intention to do this or being given an opportunity to comment on the survey report or the department's action. After the Ombudsman's intervention the motel survey form was altered, so that in future the motel owner would be made aware of the inspection and its findings. A copy of the form was to be left with the motelier after the inspection and he was to be given an opportunity to comment fully on the contents of the report, which contained a general statement of the facilities in the motel and an evaluation of the tariff as value for money.

60 During the course of the investigation, the husband/informer made similar allegations in the public domain. Legal proceedings were instituted on the basis of these statements.

61 Case 13628A, filed at Office of Ombudsman.

62 For other cases where the ombudsman has examined complaints about this department see Napier in this issue.

63 See *D v. NSPCC* [1977] 1 All E.R. 589, for the courts' handling of a similar issue. Note also the way in which the ombudsman's information role inter-relates with the more general role to check administration.

64 Case W13257, 1979 *Annual Report* 47.

65 Discussed in Part V A.

66 Case 13955, filed at Office of the Ombudsman.

### B. Access to Official Information

One case is actually reported in an annual report with the comment that “[i]n the absence of any New Zealand legislation giving a right of access to official information it often falls to the Ombudsman to encourage or persuade a department of Government to release information . . . .”<sup>67</sup>

The case in question concerned a recommendation made by the Ministry of Works to the Department of Education that a school building should be demolished as an earthquake risk. The complaint was from the school committee which had obtained a report from a private consulting engineer which appeared to conflict with the Ministry of Works recommendation. The school committee had suggested that its engineer should be allowed to see the Ministry of Works report and there should be some consultation between the two sets of engineers about the structural integrity of the building. This the Ministry of Works refused to agree to, since it regarded its reports as confidential. In part this was to prevent “unnecessary public alarm about a degree of earthquake risk.”<sup>68</sup>

The Ombudsman’s examination of the file disclosed that both sets of engineers had classified the building in question in the same risk category and suggested its replacement within a similar period of time. The difference between the two reports lay in the base-year from which the replacement should run — there was a ten year difference.<sup>69</sup> The Ombudsman suggested that the course proposed by the school committee should be adopted. The consulting engineer was shown the report and invited to discuss its contents with the Ministry’s engineers.

There is nothing in clause 7 that might have prevented this course being taken.<sup>70</sup> Furthermore, in terms of clauses 20 and 21 much of this material is required to be disclosed. Under clause 20 every person has a right to be given access to any document, which contains policies, principles, rules or guidelines in accordance with which decisions are made. This provision would have required the Ministry to announce the base year it was using. Under clause 21 every person or body of persons has a right of access to the reasons<sup>71</sup> for a decision made affecting him.

Another case concerned the Agricultural Chemicals Board.<sup>72</sup> A farmer’s property had been damaged as a result of spraying operations on a neighbouring property. At the time a Field Officer from the Ministry of Agriculture and Fisheries inspected the property and made a plant damage report to the Agricultural Chemicals

67 *1980 Annual Report* 54.

68 This might be justified under cl.7(c) of the Official Information Bill 1981, but only as a good reason for withholding information which has to be weighed against other considerations justifying the making of that information available, not as a conclusive reason.

69 The Ministry of Works used a base year of 1965. The engineer was using the base year of 1975 — that adopted by the New Zealand Society for Earthquake Engineering in its guidelines for the evaluation of buildings.

70 See n. 68.

71 See n. 35. Under cl. 7(c) certain information can be withheld from disclosure to avoid prejudice to measures —

(i) Protecting the health or safety of the public; or

(ii) Preventing or mitigating material loss to members of the public.

72 Case 14678, *1980 Annual Report* 47.

Board.<sup>73</sup> The farmer sought a copy of this report to place before the helicopter owner's insurers as proof to support his claim of damage. Access was refused. The Ministry finally released a shortened form of the field officer's report to the Ombudsman, and authorised him to communicate this to the farmer. It is obviously necessary to be careful that the Board's need for information about the use and abuse of agricultural chemicals is not impaired, but in this case it was the farmer whose property had been damaged who permitted the Ministry's officer to inspect his property; and it was he who sought access to the information gained from that inspection.

The final case<sup>74</sup> considered is one that might be thought to epitomise the general public expectation of the sort of issue that will arise in the access to information cases, rather than the more routine examples discussed previously (though it is hoped that this article has high-lighted the much wider range of information that might be requested, and issues that may be raised by the new legislation than have been suggested by the public debate up until now).

The New Zealand Forest Service commissioned a report on the attitudes of the people in a certain region of New Zealand to forestry and forest based industries. A group interested in forestry planning requested a copy of this report, which they (quite correctly) assumed had been prepared for publication, because they intended to make submissions about the development of the region that had been the subject of the study. This request was refused by the Forest Service. The group sought the assistance of the Ombudsman because a reading list attached to a publication appeared to indicate that another interest group had been given access to the report. The Ombudsman's investigation established that the report had not been made available to the other group. Publication of the report had been delayed for reasons which the Ombudsman considered acceptable. However, as a result of the investigation the Forest Service agreed that the report would be published and that a copy would be made available to the interest group complainant when the time came for them to make submissions.

## VI. CONCLUSIONS

There are two main conclusions to be drawn from this material. First the public debate about access to information has been focused on dramatic policy making decisions, it is hoped that this article has demonstrated the routine and unpolitical nature of many requests for information, and the wide variety of situations which may give rise to a need for information. Secondly, the proposals, contained in the Danks Reports and the Official Information Bill, for improved public access to official information, seem to herald such a change in our constitutional environment that it is quite understandable that people have argued that a completely

73 The purpose of the report was to provide information which might help the Board to determine whether amendments to the regulations might be necessary. It was merely to assess the extent of the damage, and not to provide evidence of the quantum of loss resulting from the damage. The Ombudsman's note quotes from the Pesticide Procedural Handbook cl. 10.1.2, so this report also falls into the general information category discussed in Part III B.

74 Case 15001, 1980 *Annual Report* 43.

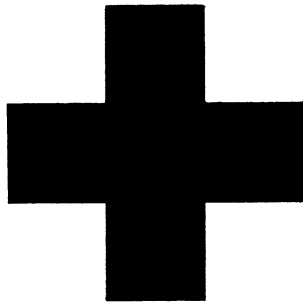
new institution needs to be established to handle complaints about refusals to permit access. This article has suggested that the change implemented by the legislation is not as radical as it may appear to be; the Office of the Ombudsman has been dealing with similar complaints for many years, consequently it would be quite appropriate for the legislation to vest in the Office the official role of handling complaints. The significant change, here as elsewhere in the Bill, would be that the issues would be dealt with in the context of the clause's presumption of accessibility of information. The ombudsman has twenty years of experience of dealing with complaints about government agencies. Up until now complaints about "matters of administration" have often contained an information element.<sup>75</sup> If the Official Information Bill is passed in its present form, in the future an unreasonable refusal by a government agency to grant access to information could be quite properly regarded as a "wrong"<sup>76</sup> decision on a "matter of administration" and dealt with by the ombudsman in the normal manner.<sup>77</sup>

75 See Part I.

76 Ombudsmen Act 1975, s.22(1)(d).

77 Subject to the changes indicated in footnotes 10, 11 and 15.

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